IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

MARTHA J. SWERINGEN,
Plaintiff in Error,

vs.

THE CITY OF ST. LOUIS,
Defendant in Error.

No. 187.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, by its counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment from which said writ was sued out is the judgment of the Supreme Court of one the United States, to-wit., the Supreme Court of the State of Missouri.

And the said defendant in error, by counsel as aforesaid, also moves the court to affirm the said

judgment upon which the said writ was sued out, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only.

B. SCHNURMACHER,
CHAS. CLAFLIN ALLEN,
Attorneys and Counsel for
Defendant in Error.

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MARTHA J. SWERINGEN,
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vs.
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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

This action, for the recovery of certain real estate, was begun in the Circuit Court of the City of St. Louis on April 16, 1895. The property to which plaintiff claims to be entitled constitutes a part of the wharf of the City of St. Louis, and embraces all that portion thereof lying between the Mississippi River and the eastern boundary line of City Blocks 2544 and 660 East, extending entirely across the wharf.

Upon a trial in the court of original jurisdiction plaintiff recovered a judgment for a portion of the land described in her petition. That part for which judgment was rendered is a strip of the wharf 90 feet wide between parallel lines and 60 feet north of the north line of Dock street. Plaintiff took no appeal from the judgment thus rendered, but defendant, the City of St. Louis, did, and the case went to the Supreme Court of Missouri. In that court the judgment of the Circuit Court was reversed. Thereupon plaintiff sued out a writ of error and thus brought the case here.

The bill of exceptions containing the history of the proceedings in the trial court is contained in the printed transcript and is quite lengthy. There is absolutely nothing in the bill or in the entire record which shows that a single Federal question was raised, presented, discussed or determined during the trial of the case or subsequently on appeal in the Supreme Court.

Plaintiff showed no paper title to the property in controversy, for which, indeed, there could be no paper title, as it forms a part of extensive accretions made by the Mississippi River since 1864; but she claims that these accretions belong to the present successors in title to one Louis Labeaume, to whom, or to whose legal representatives, the United States issued a patent in March, 1852, in confirmation of a concession made February 15, 1799, by Zenon Trudeau, Lieutenant-Governor of the Spanish Province of Upper Louisiana to said Labeaume. This patent embraces 339.68 acres of land, all covered by Survey No. 3333. According to plaintiff's contention the patent

carried the land conveyed by it to the Mississippi River, as its eastern boundary, and made it, therefore, riparian property, entitled to any accretions forming next to it in the river. The contention of the defendant, on the contrary, is that by metes and bounds, courses and distances, the eastern boundary of the tract so patented to Labeaume's representatives, was not the Mississippi River, but a fixed and definite line laid out by the surveyor in a sand beach, which interposing itself between the eastern boundary of Labeaume's land and the river, made it non-riparian property, not entitled to accretions.

In the lower court plaintiff's contention prevailed, and the court gave her judgment for the strip of 90 feet, extending across the wharf and to the river, on the theory of accretions belonging to the property covered by Labeaume's patent. In the Supreme Court the views of defendant were adopted, and that Court, taking up the description contained in the Labeaume patent, and interpreting the language thereof, upon general rules of law, held that the Lebeaume title did not reach the river and was not entitled to any of the accretions.

The Supreme Court of Missouri having reversed the judgment of the lower court, plaintiff filed her motion or petition for rehearing, based on two grounds, in each of which she sought to convince the Court that it had erred in its interpretation of the description of the property included in the patent, and in the conclusion reached by it that the eastern boundary did not extend to the river. Nowhere in the motion is a Federal question suggested.

The assignment of errors sets forth eight reasons why this court should reverse the judgment of the

State Supreme Court, none of them raising a Federal question. The substance of them all is that error was committed in the conclusion that Labeaume was not a riparian owner.

So far as the record proper is concerned it is certain that no Federal question is suggested, nor is any right or authority under the United States *specially set up or claimed*, as is required by section 709, U. S. Revised Statutes. The petition is in the usual form of petitions in ejectment under the Missouri practice, and sets forth:

1. That defendant, the City of St. Louis, is a municipal corporation.

2. That on April 9, 1891, plaintiff was entitled to the possession of the premises described.

3. That defendants on the same day entered into such possession and unlawfully withhold the same from plaintiff, to her damage in the sum of five thousand dollars.

4. That the value of the monthly rents and profits of the premises is one hundred dollars.

Plaintiff accordingly prays judgment for possession, five thousand dollars for the unlawful detention, and one hundred dollars for monthly rents and profits from the rendition of judgment until possession of the premises shall be delivered to her.

The answer of the defendant, the City of St. Louis, was:

1. A general denial of every allegation of the petition.

2. A plea of the statute of limitations (Revised Statutes of Missouri, 1899, section 4262), that it had had open, notorious, continuous and adverse possession of the premises, under claim and color of title, for more than ten years next before the filing of the petition.

3. That for more than ten years the property had been in the adverse use and occupancy of the defendant, as a public wharf, and used as such by the public, with plaintiff's acquiescence.

4. That neither the plaintiff nor her ancestor, predecessor, grantor, or the person under whom she claims, was seized or possessed of the premises within ten years before the commencement of the action.

The replication to this answer consisted of a general denial of all the allegations thereof.

In addition to reaching the conclusion that the property patented to Labeaume was not riparian property to which the accretions, embracing the property in suit, attached, the Supreme Court of Missouri also found against the plaintiff on other independent grounds.

Thus, during the trial in the Circuit Court her counsel introduced in evidence a paper and plat marked "Exhibit A," appearing in the printed transcript between pages 10 and 11, and by her counsel plaintiff agreed to be bound by this paper and plat. The plat represents plaintiff's property, tinted in pink, as bounded on the east *by the wharf* and not by the river. In its opinion the court expressly refers to this agreement and plat and finds that twenty-two years before the commencement of the action the particu-

lar property which plaintiff seeks to recover was a part of the public wharf and not claimed by any private parties. (See pp. 295-296 of printed transcript.) The court also calls attention to the fact that plaintiff paid no taxes upon the land sued for since the year 1874, but did pay taxes on property *to the wharf line.* Also that her tax receipts showed that the land on which they were paid *was bounded on the east by the wharf*, and that neither she nor her agents objected to such description. (See p. 296 printed transcript.)

The court also concludes that there was no proof of possession or seizin of the tract sued for by plaintiff or those under whom she claims within ten years prior to the commencement of the action.

On these independent grounds the judgment may well stand, without reference to any alleged Federal question.

If we understand the position taken in behalf of plaintiff, it is that the Federal question, upon which the jurisdiction of this court is invoked, arises by reason of the fact that the title to the land, which it is claimed draws unto itself the accretions in question, was derived by patent from the United States. No other theory upon which a Federal question may be said to arise can be suggested.

But the validity of the patent to Labeaume is not and was not at any time disputed. The only difference between the parties is as to the proper interpretation of the language used therein, in describing the property intended to be confirmed to Labeaume. For plaintiff the court was asked so to construe this language as to carry the side lines of the property down to the Mississippi River; on behalf of defendant, that

the proper construction of the words employed brought them down to the sand beach, and short of the river itself. Upon general principles of law the Supreme Court of the State decided that the eastern boundary was a fixed and definite line in the beach, and that between this line and the river was a considerable tract of beach land. The survey accompanying the patent will be found in the printed transcript between pages 14 and 15.

It will also appear from Exhibits A and B herewith filed, by way of evidence, that plaintiff in error is no longer interested in the premises which are the subject of this controversy. While she sued for the possession of all of the wharf between city blocks 2544 and 661 east and the Mississippi River, the contest narrowed itself down to her right to a 90 foot strip lying 60 feet north of Dock street, and for the possession of which she recovered judgment in the Circuit Court. That this is all to which she deemed herself entitled is made apparent by reference to the instruction or declaration of law offered by her counsel at the conclusion of the case, and found on page 284 of the printed transcript.

This very strip she conveyed by the deed marked "Exhibit A" to Arthur B. Barrett, S. Harper Barrett and Thomas A. Russell. Thereafter Arthur B. Barrett, by the deed marked "Exhibit B," transferred and conveyed his one-third interest therein to one Annie T. King. Plaintiff, therefore, ceased to have any interest whatever in this controversy. And not only that, but the parties who succeeded her in the title, pending this writ of error, instituted their suit in ejectment for this same property in the Circuit

Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, as will appear from the certified copy of the proceedings in that case, also herewith submitted, marked "Exhibit C." And it will further appear therefrom that the Circuit Court, taking jurisdiction on the theory that a Federal question was involved under the pleadings, and conceding the position taken by the plaintiffs therein, that they were riparian proprietors and entitled to accretions, found judgment against them and in favor of the City of St. Louis, the defendant in error herein, on the grounds of estoppel and the bar of the statute of limitations, just as did the Supreme Court of Missouri.

BRIEF.

I.

The question of riparian rights is not a Federal question but is determinable by the State courts, according to the general rules of law.

"The jurisdiction of the State over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court. The extent of plaintiff's right of property was, therefore, the subject of adjudication by the State Court, and the rule has been definitely stated by that court in its judgment which is now under review."

St. Anthony Falls Water Power Co. v. Water Commissioners, 168 U. S. 349;
St. Louis v. Myers, 113 U. S. 566;
Packer v. Bird, 137 U. S. 661;
St. Louis v. Rutz, 138 U. S. 226;
Hardin v. Jordan, 140 U. S. 371;
Ill. Cent. R. R. Co. v. Illinois, 146 U. S. 387;
Shively v. Bowlby, 152 U. S. 1.

II.

Nor does the fact that title to land is derived from the United States, *the validity of the grant not being disputed*, present a Federal question.

Avery v. Popper, 179 U. S. 305;

Blackburn v. Portland Gold Min. Co., 175 U. S. 575;

De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 525.

III.

Even if this case involved a right or authority which could properly be said to be exercised under the United States, the jurisdiction of this court cannot be invoked because the right was not "*specially set up or claimed.*"

Speed v. McCarthy, 181 U. S. 269;

F. G. Oxley Stave Co. v. Butler Co., 166 U. S. 648;

Columbia Water Co. v. Columbia Electric Street Railway, L. & P. Co., 172 U. S. 475.

IV.

The claim of a Federal question comes too late when first made in a petition or motion for rehearing.

Eastern Building & Loan Assn. v. Welling, 181 U. S. 47;

Pim v. St. Louis, 165 U. S. 273;

Sayward v. Denny, 158 U. S. 180;

Loeber v. Schroeder, 149 U. S. 580;

Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co., 137 U. S. 48.

Or in a petition for a writ of error.

Leeper v. Texas, 139 U. S. 462.

V.

And cannot be introduced in the assignment of errors.

Cincinnati, Hamilton & Dayton R. R. Co. v. Thibaud, 177 U. S. 615.

Citing:

Ansbro v. United States, 159 U. S. 695;
Cornell v. Green, 163 U. S. 75;
Muse v. Arlington Hotel Co., 168 U. S. 430;
Miller v. Cornwall R. R. Co., 168 U. S. 131;
Fowler v. Lamson, 164 U. S. 252.

VI.

The judgment of the Supreme Court of Missouri was against plaintiff, not only on the ground that she was not a riparian proprietor, and therefore not entitled to the accretions, but on other independent grounds, as appears from the opinion of the court. Under such circumstances this court will dismiss or affirm, even though the question of riparian rights raises a Federal question and was erroneously adjudicated.

Speed v. McCarthy, 181 U. S. 269;
Lowry v. Silver City G. & S. Min. Co., 179 U. S. 196;
2 Foster's Federal Practice (2 Ed.). pp. 1004, 1005.

VII.

Plaintiff in error having parted with all interest in the case, and there being no longer any controversy

between her and defendant in error, the writ should be dismissed for that, if for no other, reason.

California v. San Pablo & Tulare R. R. Co., 149 U. S. 308;
Mills v. Green, 159 U. S. 651;
County of San Mateo v. Southern Pac. R. R. Co., 116 U. S. 138;
Addington v. Adams, 125 U. S. 693;
Lord v. Veazie, 8 How. (49 U. S.) 251.

ARGUMENT.

I.

The claim of plaintiff in error that a Federal question is presented in this case arises out of the fact that riparian rights are involved. The question of riparian rights, however, is not a Federal question. This has been so frequently declared by this court that extended discussion is unnecessary. The prior decisions of the court were fully reviewed in the case of *St. Anthony Falls Water Power Co. v. Board of Water Commissioners*, 168 U. S. 349, in an opinion prepared by Mr. Justice Peckham, and the conclusion then reached was stated in the following language:

"The jurisdiction of the State over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court. The extent of the plaintiff's riparian right of property was, therefore, the subject of adjudication by the State court, and the rule has been definitely stated by that court in its judgment, which is now under review."

Among the cases reviewed is the case of *St. Louis v. Myers*, 113 U. S. 566, wherein it was held by this court that the act admitting the State of Missouri into the Union left the rights of riparian owners on the Mississippi River to be settled according to the principles of State law. In the opinion delivered by Mr. Chief Justice Waite, it was said:

"The act of Congress providing for the admission of Missouri into the Union (act of March 6, 1820, 3 Stat. at L., 545, Chap. 22), and which declares that the Mississippi River shall be 'a common highway and forever free,' has been referred to in the argument here, but the rights of riparian owners are nowhere mentioned in that act. *They are left to be settled according to the principles of State law.*"

II.

It will also be suggested by counsel for plaintiff in error that a Federal question is involved in this case because plaintiff traces her claim of title back to a patent issued by the United States to one Louis Labeaume, in confirmation of a concession by the Spanish government, made in 1799, and that the construction of this patent was involved. *But the validity or genuineness of the Labeaume patent was not in dispute.* The controversy between the parties was merely over the proper interpretation of the words descriptive of the land. The point between them was whether the eastern boundary of the land covered by the patent was carried by the words of description to the Mississippi River or to a fixed and definite line short of the river, leaving an intervening strip between the land conveyed by the patent and the stream.

Plaintiff in error contended that a correct interpretation carried the eastern boundary to the Mississippi; defendant that it did not. In the one case the land would be entitled to the accretions which are the subject of this action; in the other it would not.

This was not a Federal question. If the mere fact that the title emanated from and is traced back to the government, makes a Federal question, then, as was remarked by Mr. Justice Brewer in the case of *Hamblin v. Western Land Co.*, 147 U. S. 531:

"Almost any case in ejectment could be taken from the Supreme Court of a State to this."

In the very recent case of Avery v. Popper, decided December 3, 1900, 179 U. S. 305, it was held that (Syllabus):—

"The mere fact that a plaintiff in error was a purchaser at marshal's sale of property sold under execution from a Federal court, does not entitle him to a writ of error from the Supreme Court of the United States to a State court with respect to the validity and priority of a chattel mortgage covering the same property or a part thereof, *where there is no question as to the validity of the judgment*, or the regularity of the proceedings in the Federal court."

And so it has been held that though parties claim adversely to each other under the mining laws, *or under patents of the United States*, they are not entitled to a writ of error from this court, unless a question be made as to the meaning and construction of a Federal Statute or of an authority exercised under the United States, *and the fact that ownership comes from the United States is not enough. Blackburn v. Portland Gold Min. Co.*, 175 U. S. 575; *DeLamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 525.

It is therefore submitted that no Federal question exists in this case, merely because plaintiff claims under the Labeaume patent, the validity of which has never

been questioned. The construction or interpretation of the language used to describe the property intended to be granted depends upon general rules of law, and not upon any rules cognizable only in the courts of the United States.

In point of fact the Supreme Court of Missouri in interpreting the language of description in the patent, but followed a rule adopted by this court in a similar case. The eastern survey line, as defined in the Labeaume patent, was laid in a sand beach, beyond which was the river. The government had the right to grant to the river, or to the beach, and it chose to do the latter. The beach was land, and interposed itself between the grant and the water and thus cut off the right to accretions. In this respect the case strongly resembles the case of *Niles v. Cedar Point Club*, 175 U. S. 300, decided December 4, 1899, wherein it was held that a marsh of swampy or boggy land in which a boundary line was surveyed was enough to prevent the right to accretions forming in Lake Erie, the Court, by Mr. Justice Brewer, saying:

"Of course if the fractional sections patented to Margaret Bailey did not border on some body of water there were no riparian rights, and if the conclusion of the trial court that this marsh was land (for swamp and boggy land is to be treated as land), was correct, then whatever changes may have come to the marsh —whether it became more or less subject to overflow —would not alter the fact that the rights of Margaret Bailey, the patentee, were limited to the very lands which were conveyed to her and for which she paid, and did not extend over the meander line into the territory north. But, it is urged, that the fact that

the meander line was run amounts to a determination by the Land Department that the surveyed fractional sections bordered upon a body of water navigable or non-navigable, and that therefore the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' *But there is no such magic in a meandered line.* All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forests or prairie, land or water, government or Indian reservation."

This is exactly the case here. The description of the land embraced within the Labeaume patent bounds it on all sides, including the eastern side, by lines laid out on the surface of the earth, and which, as the record shows, can be relocated to-day as well as they were located fifty years ago. Instead of granting to the river the government elected to terminate the grant on the east in a beach which was well defined and already large in area in 1852, when Survey 3333 was made by Surveyor General M. Lewis Clark. (See Plat between pages 14 and 15, printed transcript.) This beach, it must be admitted, interposed itself as effectually as could the marsh of swamp or boggy land in the Niles case.

III.

But granting that a Federal question was involved merely because the proper interpretation of the descriptive words in the Labeaume patent became neces-

sary, or because riparian rights were involved, plaintiff in error nevertheless is not in position to invoke a review of the judgment of the Supreme Court of Missouri upon this writ of error. In order to give this court jurisdiction on the ground of a Federal question the averments must be so distinct and positive as to place it beyond doubt that the party bringing the case up by the writ intended to assert a Federal right.

The claim of a right or authority exercised under the United States must not only be "*drawn in question*" but under section 709 of the U. S. Revised Statutes, must be "*specially set up or claimed.*"

Referring to the language of this section of the Statutes in the case of *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, this court, speaking by Mr. Justice Harlan, said:

"The words, 'specially set up or claimed,' imply that if a party intends to invoke for the protection of his right, the constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is unmistakably, this court is without authority to re-examine the final judgment of the State court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence the averment that a party resides in

a particular State, does not imply that he is a citizen of that State. *Brown v. Keene*, 33 U. S., 8 Pet. 115; *Robertson v. Cease*, 97 U. S. 646, 649. Upon like grounds the jurisdiction of this court to re-examine the final judgment of a State court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a Federal right."

In the case at bar the record will be searched in vain for any allegation or averment that plaintiff claimed any Federal right or sought to raise any Federal question. The declaration, or petition as it is called in Missouri, contains no such allegation, nor any averment other than plaintiff's right to the possession of the property therein described, and its detention by the defendant. The answer consists of a denial of these averments, and affirmative pleas in various forms, of the Statute of Limitations. The replication denies generally the affirmative matters so brought forward by way of defense. The pleadings certainly, therefore, draw no Federal right in question. The bill of exceptions sets forth in detail the occurrences upon the hearing in the trial court. Nowhere and at no time, as the facts are preserved in the bill, will any allusion be found to such question. The Oxley case then applies with full force.

Nor would it avail plaintiff if some reference to a Federal question had been made upon the trial. *She was bound to set it up specially.* That is, she was bound to plead it. In *Columbia Water Power Company v. Columbia Electric Street Railway Light & Power Co.*, 172 U. S. 475, the distinction is pointed out between cases drawing in question.

(1) The *validity* of a treaty, or statute of, or authority exercised under the United States, and the decision is *against* their validity.

(2) The *validity* of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is *in favor of* their validity; and

(3) Where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is *against* the title, right, privilege or immunity *specially set up and claimed* by either party under such constitution, statute, commission or authority.

As to the first two classes it is held to be sufficient if the Federal question appears in the record and was decided, or was necessarily involved, and the case could not have been determined without deciding such question, although it was not specially set up and claimed. In this case, however, the *validity* of neither the patent nor of any statute was involved.

But as to the third class the court, through Mr. Justice Brown, says:

"There is no doubt that under the third class the Federal right, title, privilege or immunity must be, with possibly some rare exceptions, *specially set up or claimed*, to give this court jurisdiction. *Spies v. Illinois*, 123 U. S. 131, 181; *French v. Hopkins*, 124 U. S. 524; *Chappell v. Bradshaw*, 128 U. S. 132; *Baldwin v. Kansas*, 129 U. S. 52; *Leeper v. Texas*, 139 U. S. 462; *Oxley Stave Co. v. Butler County*, 166 U. S. 648."

It therefore follows that even though there was a Federal question involved in the determination of this case in the State court, the right to be heard here on writ of error cannot be insisted upon by plaintiff, because no authority exercised under the United States was specially set up or claimed.

The same conclusion was recently announced in an opinion written for the court by the Chief Justice in the case of *Speed v. McCarthy*, 181 U. S. 269, decided April 29, 1901, wherein it was said:

"It is objected that jurisdiction of this writ of error cannot be maintained because no title or right was specially set up or claimed within section 709 of the Revised Statutes. But plaintiffs in error contend that while they admit that they made no specific reference to the Statutes of the United States, their pleading nevertheless showed that they *asserted title through valid mining claims* duly located, and denied the title of the defendant in error, on the ground that the locations under which he claimed had become forfeited and abandoned, and that that was a sufficient compliance with the requirements of section 709. We cannot concede that this is so in view of the rule expounded in *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, and many other cases, and are the less disposed to that conclusion, as the case might well be held to have been decided on grounds independent of Federal questions."

In the same opinion the court also makes the following observations, which are quite pertinent in this case, in view of the fact that the Labeaume patent was not questioned; and in view of the further fact

that the opinion of the State Supreme Court was also based upon an agreement made in behalf of plaintiff in error, to be bound by a plat offered in evidence in her case in chief, whereon this very property to the possession of which she claims to be entitled, is designated as wharf. (See page 10 of printed transcript.) The Court says:

"Whether a party is estopped or not is not a Federal question. *Gillis v. Stinchfield*, 159 U. S. 168; *Pittsburg & L. A. Iron Co. v. Cleveland Iron Min. Co.*, 178 U. S. 270. Having determined that for the purposes of this action the Tin Bar claims were to be regarded as *valid in their inception*, the Supreme Court considered the controversy as to the right of a co-tenant to relocate a mining claim when the original assessment work has not been done, and obtain title as against his co-tenants. * * * The State court thus disposed of this branch of the case upon general principles of law, and its decision did not rest on the disposition of a Federal question."

And so in the case at bar, the Supreme Court of Missouri not only determined upon general principles of law that the property embraced in the Labeaume patent did not extend to the river, and was therefore not entitled to riparian rights, but upon general principles of law decided also that the plaintiff was not entitled to recover because upon the plat made some 22 years before the action was instituted, and by which plat she agreed in open court to be bound, the premises in dispute were designated as a part of the wharf, and not as private property. Whether the Supreme Court of Missouri was right or wrong in the latter conclusion is immaterial here, for it is a question

which was within its jurisdiction and with which this court is not concerned.

IV.

That the claim of a Federal right comes too late, so far as the revisory power of this court is concerned, when set up for the first time after final decision of the case by the Supreme Court of a State, whether the claim be made in a petition for rehearing or in the petition for a writ of error, or in the assignment of errors, has been so often announced by this court that we content ourselves with a mere reference to the cases cited in this brief.

Nor do we deem it necessary to enter into a discussion of the proposition that the plaintiff in error having parted, by conveyance, with all interest in the land which is the subject of this action, this writ must be dismissed. As between her and the defendant no controversy longer exists and under the cases referred to in the brief but one result follows, and that is dismissal.

For the reasons, therefore, that no Federal question was or is involved; that no Federal claim or right was specially set up or claimed; that if such claim can be found it was made after final judgment in the State court of last resort, and, therefore, too late; and that plaintiff in error has no further interest in this proceeding, and that no controversy therefore exists between the parties, it is respectfully submitted that the motion herein should be granted.

B. SCHNURMACHER,
CHAS. CLAFLIN ALLEN,
Attorneys and Counsel for Defendant in Error.

EXHIBIT A.

This indenture, made on the 17th day of April, A. D., one thousand eight hundred and ninety-five (95) by and between Martha J. Sweringen, a single woman, of the City of St. Louis and State of Missouri, party of the first part, and Arthur B. Barret, S. Harper Barret and Thos. A. Russell, of the City of St. Louis, and State of Missouri, parties of the second part, Witnesseth: That the said party of the first part, in consideration of the sum of Five Thousand Dollars, to her paid by the said parties of the second part, the receipt of which is hereby acknowledged, does by these presents, remise, release and forever quit claim unto the said parties of the second part, the following described Lots, Tracts or Parcels of Land, lying, being and situate in the City of St. Louis and State of Missouri, to-wit: All that portion of land lying and being situate between the Mississippi River and a line west of said river, surveyed and designated on the plat in the office of the Harbor and Wharf Commissioner of said city, for and purporting to be the western line of a wharf, which said land was formed as a portion of accretions to City Block No. 2544 of said city. *And being the same land sued for by the grantor herein in two actions pending in the Circuit Court of said City of St. Louis*, brought to the June Term, 1895. One of said suits being against the City of St. Louis and Justin E. Joy and numbered 125 of said term, and the other being against the St. Louis, Keokuk and Northwestern Railroad Company and numbered 126 of said term. To have and to hold the same, with all the rights, immunities, privileges and appurtenances thereto belonging, unto the said par-

ties of the second part, and their heirs and assigns forever, so that neither the said party of the first part, nor her heirs, nor any other person or persons for her or in her name or behalf shall or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred. In witness whereof the said party of the first part has hereunto set her hand and seal the day and year first above written.

MARTHA J. SWERINGEN [Seal].

State of Missouri, } ss.
City of St. Louis. }

On this 18th day of April, 1895, before me, personally appeared Martha J. Sweringen, a single woman, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed. And the said Martha J. Sweringen further declared herself to be single and unmarried.

In testimony whereof I have hereunto set my hand and affixed my official seal at my office in St. Louis, the day and year first above written.

My term expires November 16, 1899.

LIZZIE J. HUDSON, Notary Public.

Copy of Seal: Lizzie J. Hudson,
Notary Public, City of St. Louis, Mo.

Filed and recorded Oct. 20, 1898, at 12:12 p. m.

M. D. LEWIS, Recorder.

State of Missouri, } ss.
City of St. Louis. }

I, the undersigned, Recorder of Deeds of said City and State, do hereby certify the foregoing to be a true copy of an instrument of writing executed by Martha J. Sweringen to Arthur B. Barret et al., together with the acknowledgment and date of filing and recording thereof, as the same remains of record in my office in book 1466, page 281.

In witness whereof I have hereunto set my hand and official seal this 13th day of May, A. D. 1901.

[Seal]. WM. H. HAHN, Recorder

EXHIBIT B.

U. S. Rev. Stamp,
50c. A. B. B. 10-22-98.

This indenture, made on the twenty-second day of October, A. D. one thousand eight hundred and ninety-eight, by and between Arthur B. Barret, a single man of the City of St. Louis and State of Missouri party of the first part, and Annie T. King of the City of St. Louis and State of Missouri party of the second part, witnesseth: that the said party of the first part, in consideration of the sum of Five Hundred dollars, to me paid by the said party of the second part, the receipt of which is hereby acknowledged, does by these presents remise, release and forever quit claim unto the said party of the second part the following described lots, tracts or parcels of land, lying, being and situate in the City of St. Louis and State of Missouri, to-wit: An undivided one-third interest in a certain parcel of land situated in the City of St. Louis and State of Missouri, to-wit: All that portion of land lying and being sit-

uate between the Mississippi River and a line west of said river, surveyed and designated on the plat in the office of the Harbor and Wharf Commissioner of said city for and purporting to be the western line of a wharf which said land was formed as a portion of accretions to city block No. 2544 of said City, and being the same land sued for by the former grantors in two actions pending in the Circuit Court of said City of St. Louis, brought to the June term, 1895, one of said suits being against the City of St. Louis and Justin E. Joy, and numbered 125 of said term, and the other being against the St. Louis, Keokuk and Northwestern Railroad Company, and numbered 126 of said term. To have and to hold the same with all the rights, immunities, privileges and appurtenances thereto belonging unto the said party of the second part and her heirs and assigns forever, so that neither the said party of the first part nor his heirs, nor any other person or persons for him or in his name or behalf shall or will hereafter claim or demand any right or title to the aforesaid premises or any part thereof, but they and every one of them shall by these presents be excluded and forever barred. In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

ARTHUR B. BARRET [Seal.]

State of Missouri, } ss.
City of St. Louis. }

On this 22d day of October, 1898, before me personally appeared Arthur B. Barret, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed

the same as his free act and deed. In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in City of St. Louis, Mo., the day and year first above written. My term expires March 3d, 1902. George L. Neuhoff, Notary Public, in and for City of St. Louis and State of Missouri.

Copy of Seal: George L. Neuhoff,
Notary Public, City of St. Louis, Mo.

Filed and recorded Oct. 22d, 1898, at 2:55 p. m.

M. D. LEWIS, Recorder.

State of Missouri, } ss.
City of St. Louis. }

I, the undersigned Recorder of Deeds for said City and State, do hereby certify the foregoing to be a true copy of an instrument of writing executed by Arthur B. Barret to Annie T. King, together with the acknowledgment and date of filing and recording thereof, as the same remains of record in my office in book 1470 at page 501.

In witness whereof, I have hereunto set my hand and official seal this 13th day of June, A. D. 1901.

WM. H. HAHN,
[Seal.] Recorder.

EXHIBIT C.

United States of America, }
Eastern Division of the Eastern Judicial } ss.
District of Missouri. }

In the Circuit Court of the United States in and for the Eastern Division of said district.

Be it remembered, That on the 22nd day of July, A. D. 1899, there was filed in the Clerk's Office of said

Court a certain petition, in words and figures as follows, to-wit:

(Petition).

United States of America. }
Eastern District of Missouri. } ss.

In the Circuit Court of the United States, for the Eastern Division of the Eastern Judicial District of Missouri.

Arthur B. Barret, S. Harper Barret, and Thomas A Russell,	Plaintiffs,	September Term, 1899.
vs.		
City of St. Louis and Justin E. Joy,	Defendants.	

Plaintiffs state that defendant City of St. Louis is a municipal corporation in the State of Missouri.

Plaintiffs further state that as the legal representatives of Louis Lebeaume, and under and by virtue of letters patent of the United States, issued to said Louis Lebeaume or his legal representatives, bearing date the twenty-fifth day of March, 1852, signed by Millard Fillmore, President of the United States, with the seal of the General Land Office thereunto affixed, and recorded in said General Land Office, they became the owners of and entitled to the possession of the following described real estate, on the eighteenth day of April, A. D. 1895, situate in the City of St. Louis and State of Missouri, to-wit:

Bounded on the East by the Mississippi River; on the west by the east line of city block number 2544 of said city, the latter line being the same as a line sur-

veyed for the western line of a contemplated wharf under city ordinance number 5403 of said city; on the south by a line parallel with and sixty feet north of the north line of Dock street of said city extended to the Mississippi River, and on the north by a line parallel with and one hundred and fifty feet north of said north line of said Dock street extended as aforesaid to said river, which said real estate exceeds the value of five thousand dollars.

Plaintiffs further state that by an act of Congress of the United States, entitled: "An Act authorizing documentary evidence of titles to be furnished to the owners of certain lands in the City of St. Louis," approved June 12th, 1866, it is provided as follows: "Sec. 9. And be it further enacted, That all of the right, title and interest of the United States in and to all of the wharves, streets, lanes, avenues, alleys, and other public thoroughfares which are situate, lying and being within the corporate limits of the City of St. Louis, in the State of Missouri, shall be, and the same are hereby, granted, relinquished, and conveyed by the United States, in fee simple and in full property, to the said City of St. Louis, and to the successors and assigns forever of said city; Provided, however, That no individual rights, or titles acquired previously hereto, shall be in any manner impaired or prejudiced hereby."

Plaintiffs further state, that being so entitled to the possession of said real estate, the defendants afterwards, to-wit, on said eighteenth day of April, 1895, entered into such premises, claiming the same as wharf, and unlawfully withhold from plaintiffs the possession thereof, to their damage in the sum of five thousand dollars. They further aver that the monthly

value of the rents and profits of said premises is one hundred dollars. Wherefore they demand judgment for the recovery of the premises, and five thousand dollars damages for the unlawfully withholding the same from plaintiffs, and one hundred dollars for monthly rents and profits, from the rendition of judgment until the possession of the premises is delivered to plaintiffs, and for other proper relief.

THOS. A. RUSSELL, pro se,
E. P. JOHNSON,
Attorney for Plaintiffs.

Upon the filing of said petition there was issued out of the Clerk's office of said Court a summons which, with the Marshal's return of service endorsed thereon, is in words and figures as follows, to-wit:

(Summons).

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri. } sct.

In the Circuit Court of the United States, in and for the Eastern Division of said district.

The President of the United States of America to the Marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon City of St. Louis and Justin E. Joy, citizens of the State of Missouri, that they be and appear before the Honorable Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, on the first day of the next term thereof, to be holden at the City of St. Louis, in and for the Eastern

Division of said district, on the third Monday of September next, then and there to answer the complaint of Arthur B. Barret, S. Harper Barret and Thomas A. Russell, as set forth in the petition filed in said Court on the 22nd day of July, A. D. eighteen hundred and ninety-nine.

Hereof fail not and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 22nd day of July, A. D. eighteen hundred and ninety-nine.

Issued at office, in the City of St. Louis, under the seal of said Circuit Court, the day and year last aforesaid.

[Seal.] T. L. CRAWFORD, Clerk.

(Marshal's Return).

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri. } sct.

I certify that I executed this writ at the City of St. Louis, in the above named district, on the 24th day of July, 1899, by delivering a certified copy thereof and a copy of the petition in this cause as furnished by the Clerk to Henry Ziegenhein, Mayor of the within named Defendant Corporation, the City of St. Louis.

I certify that I further executed this writ at the City of St. Louis, in the Eastern Judicial District of Missouri, on the 14th day of August, 1899, by delivering a certified copy thereof to the within named Defendant, Justin E. Joy.

LOUIS C. BOHLE,
U. S. Marshal, Eastern District of Missouri.

And afterwards, to-wit: On the 18th day of September, A. D. 1899, there was filed in said cause a Plea to Jurisdiction, in words and figures as follows: to-wit:

(Plea to Jurisdiction).

United States of America, }
Eastern District of Missouri. } ss.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Arthur B. Barrett, S. Harper Barrett, and Thomas A Russell, Plaintiffs, vs. City of St. Louis and Justin E. Joy, Defendants. } No. 4217.

Now comes the City of St. Louis, one of the defendants in the above entiled cause, and appearing for the purposes of this pleading only, filed this, its plea, to the jurisdiction of the court, and for grounds of such plea, avers:

1. The court is without jurisdiction to try the case set forth in the petition.

2. It appears upon the face of the petition that the matter in dispute does not arise under the Constitution or laws of the United States; nor relate to any subject matter, which by the statutes of the United States is made the subject of jurisdiction of this court; nor is there any averment that the cause of action is between persons of diverse citizenship within any provision of the statutes of the United States.

3. It does not appear upon the face of the petition that any right, title, privilege or immunity, on which recovery depends, would be defeated by one construction of the Constitution, or any law or treaty of the United States, or sustained by an opposite construction.

4. This court has no jurisdiction of the subject matter of the cause of action sought to be stated in the petition.

5. This court has no jurisdiction of the parties plaintiff or defendant, or either or any of them, under any cause of action sought to be stated in the petition.

6. No federal question is involved in any averment or averments contained in the petition.

B. SCHNURMACHER,
CHAS. CLAFLIN ALLEN,
Attorneys for Defendants,
The City of St. Louis.

And afterwards, to-wit: On the 18th day of October, A. D. 1899, the following among other proceedings were had and appear of record in said cause, to-wit:

(Plea to Jurisdiction sustained).

Arthur B. Barret, et al., Plaintiffs,
vs.
City of St. Louis, et al., Defendants.
No. 4217.

The Court having considered the plea to jurisdiction heretofore submitted herein.

It is ordered that said plea be sustained.

And afterwards, to-wit: On the 23rd day of October, A. D. 1899, there was filed in said cause an Amended Petition, in words and figures as follows, to-wit:

(Amended Petition).

United States of America,
Eastern District of Missouri. } ss.

In the Circuit Court of the United States, for the Eastern Division of the Eastern Judicial District of Missouri.

Annie F. King, S. Harper Barret and Thomas A. Russell,		September Term, 1899.
vs.	Plaintiffs,	
City of St. Louis and Justin E. Joy,	Defendants.	

Plaintiffs, for amended petition filed by leave of Court, state that defendant City of St. Louis is a municipal corporation in the State of Missouri.

Plaintiffs further state that under and in pursuance of an Act of Congress of the United States, approved March 3rd, 1807, entitled "An Act respecting claims to land in the Territories of Orleans and Louisiana," letters patent of the United States were issued to Louis Lebeaume or his legal representatives, bearing date the 25th day of March, 1852, signed by Millard Fillmore, President of the United States, with the seal of the General Land Office thereunto affixed, and recorded in said General Land Office, whereby there were granted to said Louis Lebeaume or his legal representatives, the land embraced in United States Survey No. 3333, containing three hundred and thirty-nine

and sixty-eight one hundredths (339.68) acres, in Township forty-five (45) North, Range seven (7) East of the fifth principal meridian, in said City of St. Louis, and lying on the west bank of the Mississippi River.

That plaintiffs as such legal representatives of Louis Lebeaume, became the owners of the real estate hereinafter described, under and by virtue of said letters patent, and that a controversy has arisen between them and the defendants herein as to the proper construction of said letters patent, wherein it is claimed by the plaintiffs, and they so state the fact to be, that under and by virtue of said letters patent said river is the eastern boundary of said survey number 3333, and that the said Louis Lebeaume or his legal representatives were granted all of the land lying on said west bank of said river, between the northern and southern boundary lines of said United States survey number 3333, to said river, and that they were thereby constituted riparian proprietors and owners of all of the land along said river bank between said north and south lines of said survey, and were thereby vested with the title to, and ownership of, all land thereafter formed by accretions or gradual deposits from said river along said west bank thereof, between said north and south lines of said United States survey, where a large body of land was formed by accretions to said survey number 3333.

That said claim of plaintiffs as to the proper construction of said patent, is disputed by defendants, and contested by them in regard to the title to the land hereinafter described, and which land is a portion of the land formed by accretions or gradual deposits from said river, along said west bank thereof, between said north and south lines of said United States

survey, and which thereby became a portion of the land granted by said letters patent, and is the land herein sued for.

That said disputed question between plaintiffs and defendants, as to the proper construction of said letters patent, constitutes the controlling question in this case upon the correct decision of which the plaintiffs' title to the premises sought to be recovered herein depends, and they therefore aver that this suit arises under the laws of the United States and said letters patent issued in pursuance threof.

They further state that as such legal owners of the premises they were entitled to the possession of the same under and by virtue of said letters patent, on the 18th day of April, 1895, which are described as follows:

Bounded on the east by the Mississippi River; on the west by the east line of City Block number 2544 of said City, the latter line being the same as a line surveyed for the western line of a contemplated wharf under City Ordinance number 5403 of said City; on the south by a line parallel with and sixty feet north of the north line of Dock street of said City extended to the Mississippi River, and on the north by a line parallel with and one hundred and fifty feet north of said north line of said Dock street extended as aforesaid to said river, which said real estate exceeds the value of two thousand dollars.

Plaintiffs further state that by an Act of Congress of the United States, entitled, "An Act authorizing documentary evidence of Title to be furnished to the owners of certain lands in the City of St. Louis," approved June 12th, 1866, it is provided as follows:

"Sec. 9. And be it further enacted, That all of the right, title and interest of the United States in and to all of the wharves, streets, lanes, avenues, alleys and other public thoroughfares which are situate, lying and being within the corporate limits of the City of St. Louis, in the State of Missouri, shall be, and the same are hereby, granted, relinquished, and conveyed by the United States, in fee simple and in full property, to the said City of St. Louis, and to the successors and assigns forever of said City; Provided, however, That no individual rights, or titles acquired previously hereto shall be in any manner impaired or prejudiced hereby."

Plaintiffs further state that being so entitled to the possession of said real estate herein described and alleged to be a portion of the accretions to said survey number 3333, the defendants afterwards, to-wit, on said eighteenth day of April, 1895, entered into such premises, claiming to own the same as wharf under and by virtue of said Section 9 of said last named Act of Congress, and in pursuance of said Ordinance number 5403 of said City, approved August 6th, 1864, entitled, "An Ordinance to open and establish the wharf from Biddle street to the northern boundary of the City, and from Hazle street to the southern boundary of the City," providing for the condemnation of the same as a portion of the wharf of said City; and unlawfully withhold from plaintiffs the possession thereof, to their damage in the sum of five thousand dollars. They further aver that the monthly value of the rents and profits of said premises is one hundred dollars.

Wherefore, they demand judgment for the recovery of the premises, and five thousand dollars dam-

ages for the unlawful withholding the same from plaintiffs, and one hundred dollars for monthly rents and profits, from the rendition of judgment until the possession of the premises is delivered to plaintiffs, and for other proper relief.

THOS. A. RUSSELL, pro se,
E. P. JOHNSON,
Attorney for Plaintiffs.

And afterwards, to-wit: on the 22d day of December, A. D. 1899, there was filed in said cause, the separate answer of the City of St. Louis, in words and figures as follows, to-wit:

(Separate Answer of The City of St. Louis.)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Annie F. King, S. Harper Barret and Thomas A. Russell,		
vs.	Plaintiffs,	No. 4217.
The City of St. Louis and Justin E. Joy,		
	Defendants.	

Now comes the defendant, the City of St. Louis, and by leave of court first obtained, files this, its separate answer to the petition of plaintiff, and for such answer denies each and every allegation in said petition contained.

II.

And for a further answer to said petition this defendant avers that it has had open, notorious, continu-

ous and adverse possession of the premises described in said petition, under claim and color of title, for more than ten years next before the filing of said petition.

III.

And for a further answer to said petition, this defendant avers that the property described in plaintiff's petition has been in adverse use and occupancy of this defendant, the City of St. Louis, as a public wharf of said city, for a period of more than ten years prior to the filing of said petition, and said land has been held by the City of St. Louis and has been used by the public as such public wharf during said period of time, and that said plaintiffs and those under whom they claim, have acquiesced in said public use, and are estopped to deny the same.

IV.

And for a further and separate answer and defense, this defendant says that neither the plaintiffs, nor their ancestors, predecessors, grantors, or the persons under whom they claim, were seized or possessed of the premises described in the petition and in question in this case, within ten years before the commencement of this action.

Further answering, this defendant avers that heretofore, Martha J. Sweringen, the grantor of the plaintiffs in this action, and under whose title alone the plaintiffs herein claim a right to recover, filed her suit in ejectment, to the June Term, 1895, of the Circuit Court of the City of St. Louis, against the same defendants as are made defendants herein, to-wit, the

City of St. Louis and Justin E. Joy, which said suit was numbered 99865, in Court Room No. 6 of said Circuit Court of the City of St. Louis, and in which said suit said plaintiff sought to recover possession and damages for the unlawful withholding from the plaintiff of the same property herein made the subject of suit by these plaintiffs.

Thereafter, and on June 3, 1895, the defendant, Justin E. Joy, filed an answer to the petition of plaintiff therein, in the form of a general denial; and thereafter this defendant, the City of St. Louis, by leave of court, filed its separate answer, containing the same four defenses hereinbefore in this answer set forth.

And thereafter the plaintiff filed as a reply to the separate answer of this defendant, the City of St. Louis, a general denial of the allegations of said answer.

Thereafter such proceedings were had in such cause that on the 2d day of December, 1896, the court found the issues in favor of plaintiff and adjudged that the plaintiff recover of the defendants the possession of the premises now here in suit, and also recover of the defendant, the City of St. Louis, the sum of five thousand dollars for detention thereof, and the value of the monthly rents and profits, which the court found to be the sum of one hundred dollars.

Thereafter such proceedings were had that the motions for new trial, filed by the defendants, were overruled, and the defendant, the City of St. Louis, appealed said cause to the Supreme Court of Missouri.

Thereafter, on June 15, 1899, the Supreme Court of Missouri reversed the said cause, without remanding

the same, and adjudged that the plaintiff, Martha J. Sweringen, had no title to the property in controversy.

This defendant avers that said judgment of the Supreme Court was rendered upon the ground, and for the reason, that the patent of the United States to Louis Lebeaume, for property to which the land in controversy was claimed as an accretion, did not convey land bounded by the Mississippi River, because by the description in said patent the eastern boundary of said land was a permanent line fixed by courses and distances, metes and monuments, between high and low water mark, and included a definite number of acres called for by said patent and shown specifically upon the plat, which was made a part of said patent, as a description of the land described in said patent.

And this defendant avers that by said prior adjudication of the title to the premises here in controversy, the plaintiffs are barred from maintaining this action.

This defendant further avers that the adjudication by the Supreme Court is of a matter entirely within the jurisdiction of the courts of Missouri, and especially of said Supreme Court, and is binding upon this court in this action, for the reason that the question herein involved is a matter of State law, and does not involve any question affecting the Constitution or laws of the United States, or relating to any subject matter which, by the laws of the United States, is made the subject of jurisdiction of this court.

Wherefore, this defendant, objecting and protesting to the jurisdiction of this court, files this, its sep-

arate answer, to the petition of plaintiffs herein, and prays that it may be hence discharged with its costs.

B. SCHNURMACHER,
CHAS. CLAFLIN ALLEN,
Attorneys for Defendants,
The City of St. Louis.

And afterwards, to-wit: on the 16th day of May, A. D. 1900, the following further proceedings were had and appear of record in said cause, to-wit:

(Judgment.)

Annie F. King, S. Harper Barret and Thomas E. Russell, Plaintiffs, vs. City of St. Louis and Justin E. Joy, Defendants.	No. 4217.

Now, at this day, come said parties by their respective attorneys, and this cause having been submitted to the court upon the evidence and proofs adduced (a jury having been waived), and the court being now fully advised of and concerning the premises, doth find the issues herein enjoined in favor of the defendants.

It is therefore considered by the court that the plaintiffs, Annie F. King, S. Harper Barret and Thomas A. Russell, take nothing by their suit in this behalf, and that said defendants, City of St. Louis and Justin E. Joy, go hence without day and recover of said plaintiffs their costs and charges herein expended and have execution therefor.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Annie F. King, et al., Plaintiffs, vs. City of St. Louis, et al., Defendants.	No. 4217.
Wilford P. Joy, Plaintiff, vs. City of St. Louis, et al., Defendants.	No. 4225.
Tyler Estate, Plaintiff, vs. City of St. Louis, et al., Defendants.	No. 4266.

Memoranda of Judge Adams on Final Hearing.

May 16, 1900.

In the light of the Spanish concession and the survey thereof by Soulard, as found in the patent to Louis Labeaume or his legal representatives, and the survey of the Surveyor General for Illinois and Missouri made in 1852, all thereof being examined and considered for the purpose of ascertaining the intent of the United States in fixing the eastern boundary of Survey 3333, and of placing the true construction upon the grant of the United States to Louis Labeaume, I have reached the conclusion that the eastern boundary of survey 3333 is the meander line of the Mississippi River and not the line actually fixed by courses and distances in the survey.

Louis Labeaume acquired his rights to the land in question by virtue of a concession from the Lieutenant Governor of the Spanish Province of Upper Louisiana, surveyed in 1799 by the Spanish surveyor, A. Soulard.

All the proceedings of the United States concerning this land since that day have been taken, not to confer any new right upon Labeaume or his legal representatives, but for the purpose of ascertaining what his rights were as conferred by the original Spanish concession. By the provisions of the treaty of Paris, the rights of all persons duly acquired either under Spanish or French laws, were to be recognized and respected by the United States, therefore whatever rights Labeaume acquired by virtue of the Spanish concession, were rights which the United States had by treaty agreed to respect. Now, what were those rights? The Spanish survey, a copy of which appears in the patent issued by the United States to Louis Labeaume, or his legal representatives, in 1852, clearly shows to the eye that the eastern boundary of the tract in question was the Mississippi River. The United States at the time it granted the patent in 1852 so understood it. There are many references in the patent indicating the purpose of the United States to respect the rights of Labeaume as obtained from Spain; for instance, it is said in the patent, "whereas, it further appears from the aforesaid patent certificate (referring to one deposited in the General Land Office) that pursuant to the decision on the 25th day of July, 1851, of the Secretary of the Interior, those claiming under Labeaume are entitled to a patent for the land according to Soulard's survey and Labeaume's possession, and that the lines of said Soulard survey have been retraced in conformity with the decision referred to."

This excerpt from the patent in question clearly shows that the Secretary of the Interior had determined that Labeaume was entitled to the land accord-

ing to Soulard's survey, and that the survey on which the patent was issued was a mere retracing of the lines of the Soulard survey. Again, there appear in the patent the following remarks: "The survey of this tract, as made by A. Soulard in March, one thousand seven hundred ninety-nine, a copy of which as attached hereto represents the area thereof to be 374 arpens, there being 25 arpens and thirty one-hundredths of an arpen, equal to 21 52-100 of an acre less than found by this survey, but as no notes of Soulard's survey describe the meanders of the Mississippi River and of the Rocky Branch, the former bounding the tract on the east and the latter in part on the north, there are therefore no means to ascertain whether the difference or excess in the area of this survey over that given by Soulard is owing to a miscalculation by said Soulard, or to the subsequent accretion along the bank of the Mississippi River since Soulard's operations. This accretion appears to be rapidly advancing. That portion of the tract eastward of the high bank, shown topographically on the foregoing plat, the top of which is designated by the dotted line a, b, c, d, e and f, appears to be the accretions since Soulard's time and consists of about 14 acres."

The foregoing excerpt from the patent, taken in connection with the plat or survey 3333, clearly indicates to my mind that the government of the United States in issuing the patent in question not only undertook to survey Labeaume into the land called for by the Spanish concession, but in terms declared that Soulard's survey of the Spanish concession bounded the tract on the east by the Mississippi River. Not only so, but that excerpt shows that there were granted to Labeaume, or his legal representatives, by

the patent in suit at least 14 acres of accretions which had been formed since the time of the Soulard survey. These excerpts clearly recognize not only that the land is bounded on the east by the Mississippi River, which fact as a proposition of law entitles the patentee to the accretions, but also that accretions had been forming and were still forming, and that all accretions then in 1852 formed, belong to the patentee.

The foregoing evidences of intention as manifested by an inspection of the four corners of the grant are too strong to be ignored by anything less that a palpable and clear statement of the government to the contrary, but I find no such palpable or clear statement anywhere in the patent. It is true that the eastern boundary line of survey 3333, as surveyed by Clark in 1852, can be traced without reference to the river. The courses and distances are definite and clear, but it is to be noted that this line starts on the north by what is called point "F," in the mouth of Rocky Branch. From this point the survey reads as follows: "From the corner 'F' down the right bank of the Mississippi River with the meanders thereof between high and low water mark." Certain courses and distances then are given, ending at the place of beginning. The beginning corner was a stake set on the right bank of the Mississippi River between high and low water mark. Apart from all the indications and intentions shown by a consideration of the language of the patent, it is, to say the least, under the authorities very doubtful, if the eastern boundary line of the survey, commencing as it does at the mouth of the Rocky Branch and running down the river with the meanders thereof between high and low water mark and ending

with a point on the river between high and low water mark, would not of itself clearly and unquestionably bound the survey on the east by the river. But conceding that this is doubtful, when taken in connection with the other provisions of the patent, the doubt in my opinion is cleared up and the river must be held to be the eastern boundary of survey 3333.

This conclusion entitles the plaintiffs in these cases to the land in question as accretions unless some one of the affirmative defenses pleaded by the defendants is made out. These defenses are:

(1) Adverse possession on the part of the City of St. Louis and its grantees for a period of at least ten years.

(2) Want of possession on the part of the plaintiffs, or those under whom plaintiffs claim, for a period of ten years prior to the institution of these suits.

(3) Dedication by the plaintiffs of the land in controversy for the use of a public wharf by the city.

There is no sufficient evidence to sustain the technical defense of adverse possession on the part of the City of St. Louis for a period of time which gives it a title in fee simple to the ground in controversy.

It is a fact that the plaintiffs have never been in actual possession of the land in dispute, and of course they were not in actual possession thereof for ten years immediately prior to the institution of these suits, but in my opinion this last mentioned fact constitutes no defense to the plaintiffs' right of action. Notwithstanding the plaintiffs have not been in actual possession, they have been so far as this defense is

concerned in that constructive possession and seisin which follow the ownership of the legal title, and in my opinion that kind of possession, in the absence of actual adverse possession by the city, is sufficient under the statutes of the State of Missouri to entitle the plaintiffs to maintain an action in ejectment for the land.

The next defense is that the plaintiffs by divers acts, both of omission and commission, have dedicated the lands in question to public use.

This is an issue resting essentially in intent. All that is required is that the owner should have assented to the appropriation of his property for public use, and that the same should have been so used by the public. No particular form of words is required to constitute a dedication. All that is necessary is to find an unequivocal intention on the part of the owner to dedicate his land to the use of the public. In order to correctly determine this issue of intent reference should properly be had in the first instance to the situation of the parties, and to their understanding of their actual legal rights.

Prior to 1873, it seems that the Buchanan heirs, holding under the Rufus Easton Survey No. 2042, partitioned and platted their lands bounding the same on the south by Rocky Branch and on the east by the Mississippi River. This partition and plat included land as far south as Dock street and a little farther, in fact. The Easton survey, bounded as it was on the south by Rocky Branch, gave much color to the claim of ownership by the Buchanan heirs. If their claim was tenable, the Buchanan title cut off any right of plaintiffs to accretions, as such right would attach to the intercepting lands of the Buchanan heirs.

This being the condition of the title up to 1873, it may confidently be assumed that no strenuous contention was made before that date by plaintiffs to the accretions along the river. In that year, 1873, the Buchanan heirs and part of the Tyler heirs, whose lands bounded the Buchanan lands on the south, entered into an agreement fixing their division line some distance north of Dock street, and extending eastwardly to the river. This line so fixed by the Buchanan and Tyler heirs necessarily drew northward the lines of the Sweringen estate, which lie adjoining the Tyler lands on the south, and correspondingly drew northward the Joy tract, which lies next southward of the Sweringen tract. The Sweringen and Joy tracts were thus located for them by the agreement between the Buchanan and Tyler heirs, and although there is no evidence of Sweringen and Joy, or their grantors, joining in the agreement of 1873, by availing themselves of it, they of necessity adopted and must be affected by its true legal significance. According to the agreement of 1873, treating it as establishing the true southern line of the Buchanan tract, the plaintiffs' lots are extended through to the river, otherwise, that is apart from this agreement, they might or might not be so extended.

Such was the situation of the parties and of their respective claims in 1873, and it is in the light of this situation, among other things, that the final issue now being considered must be solved.

What was the plaintiffs' intention with respect to their lots in question?

They say they always asserted a claim of individual ownership over their respective lands to the river's

bank. Defendants say plaintiffs found a well defined line surveyed before 1873 and marked by stone posts indicating the west line of a public wharf running northwardly and southwardly along the river and recognized such line in 1873 when their right through the Buchanan tract was first established, and continued to so recognize it down to the institution of this suit, or the one heretofore instituted, for the same relief in the State court.

The facts relating to this issue are substantially as follows: Plaintiffs or either of them, or their grantors, have never taken actual possession of the land in question. The agreement of 1873 was written on a plat upon which the Tyler, Sweringen and Joy tracts appear in different colors, extending from City Block 308E eastwardly with figures fixed showing distances between city blocks and ending at the western boundary line of what is distinctly marked on the plat as wharf.

The wharf line is here distinctly recognized and in my opinion, notwithstanding the words of the agreement, state in substance that they have fixed the division line to the river, this language must be construed in connection with the plat on which it is written, which shows the subject matter with which the parties were dealing; and when so construed the agreement must be held to treat the river referred to in the agreement as beginning with the wharf line. The western wharf line was fixed by public ordinance of the City of St. Louis in 1864 and was soon thereafter surveyed and marked by well defined object calls. At the same time and by the same ordinance the eastern boundary line of the wharf was fixed some

three or four hundred feet east of the western line, and much rock and filling were dumped in the river along this eastern line so as to clearly indicate its position at least in times of low water.

It may confidently be asserted, I think, that in 1873 the Tyler estate, by becoming a party to this agreement and subsequently both the Sweringen estate and Joy by adoption of this agreement, recognized the existence of the wharf along their eastern line. Not only so, but plats appeared in the public offices of the city clearly asserting the existence of the wharf and referring as the source of the right of so locating and maintaining the wharf to a public ordinance of the city establishing the same. Another important fact appearing upon the dominant question of intention now under consideration is this: About the year 1874 or 1875 City Block 2544 first makes its appearance upon the plats of the city. This block appears to be laid out in conformity to the general plan theretofore adopted by the city in that region. This block extends from Buchanan street on the north to Dock street on the south and is bounded on the east by the west wharf line as established by ordinance 5403, already referred to. Thus bounding it on the east by the wharf line makes an irregular and triangular block with the lots much deeper eastwardly and westwardly along and nearer to Buchanan street than they are farther south towards Dock street. Immediately following the appearance of this city block among the plats of the city, the plaintiffs in these three cases, notably the Tyler estate and the Sweringen estate, again recognize the wharf line as the eastern boundary line of their several tracts by in some instances returning their lands for taxation as bounded on the east by the wharf line, and

in many instances describing the same as located in City Block 2544, stating depths and distances which limit their claims for taxation purposes to the property in that block and of necessity to the western wharf line as their eastern boundaries; and again in all instances, whether they actually made returns of their lands for taxes or not, they have paid taxes assessed by the city and State against them on lands bounded on the east by the western wharf line, and there is no evidence in this case that the plaintiffs, or either of them, ever seriously demurred or demurred at all to that limitation of their tax liability to lands on the west of the western wharf line. Even as late as 1897 or 1898 the Tyler heirs, in transferring their title to the Tyler Estate, a corporation formed to manage the estate of the Tyler heirs, defined and bounded their possession on the east by the west wharf line already indicated.

Again, in 1894, the Tyler Estate and Mrs. Sweringen had their property surveyed for the purpose of putting squatters off, as it is called, and this plat or survey distinctly bounds their possessions on the east by the west wharf line. This was acted upon and squatters were put off. There is no substantial evidence that any attempt was made to put off squatters from that part of the property lying east of the west wharf line.

In 1891 the city publicly asserted a claim to the wharf by passing ordinance No. 16,161, entitled "An ordinance to lease to Justin E. Joy a portion of the unimproved wharf at and north of the foot of Dock street," and afterwards, pursuant to the provisions of that ordinance, on April 20, 1891, by executing a lease to Mr. Joy in conformity to the provisions of the ordi-

nance. This lease gave Joy the full right to use all that part of the wharf excepting the right of way of the St. Louis, Keokuk and Northwestern Railroad Company, which before that time, as will hereafter appear, had secured a right of way over the wharf. In this lease to Joy the city reserved the right to permit steamboats, barges and other water craft to land at that wharf, and preserved the right to collect from them the lawfully established wharfage charges, and specially provided that the lessee, Joy, should never make any charges for landing at that wharf by any steamboats, barges or other water craft having business there. Joy took possession of the property so leased to him and immediately commenced the exercise of his right under his lease and has continued so to do up to the present time, using the same mainly as a lumber yard. The proof shows no objections to this action of the city until about the time this suit was brought. The proof also shows that in 1889 the city by public ordinance No. 15,367 authorized the St. Louis, Keokuk and Northwestern Railroad Company to use a certain portion of the western part of the wharf as its right of way for operating its railroad into and out of the City of St. Louis. Pursuant to the authority there conferred the railroad company soon thereafter expended large sums of money and constructed its railroad along that right of way and immediately commenced the use of the same and continued the use of the same to the present time. Notwithstanding these public assertions of right on the part of the city and notwithstanding the immediate occupancy of the wharf by parties under licenses from the city, as already stated, and notwithstanding their expenditure of large sums of money pursuant to the

rights conferred by the city, all of which the plaintiffs must be held to have known, there appeared no objections thereto, but on the contrary a manifest acquiescence therein up to about the time of this suit, or its predecessor, was instituted. I cannot view these divers and many public and private acts of the parties and acquiescence therein by the plaintiffs in any other light than as the strongest evidence of an intention on their part to recognize the western wharf line as laid out pursuant to the ordinance of 1864, as their eastern boundary line, and as effectually dedicating any right, title or interest, which they might have had thereto, to the public use as and for a wharf.

All these divers acts already enumerated, both actively and passively on the part of the plaintiffs themselves, and actively on the part of the City of St. Louis, and those claiming under it, acquiesced in by the plaintiffs, are acts of estoppel in pais which afford the strongest evidence of public dedication.

I have not overlooked the testimony concerning the Lemon lease introduced in evidence by the plaintiffs, or the other evidences showing their assertion of claims of rents and otherwise, but it is perfectly clear that these evidences relate to property considerably west of the western wharf line and afford no substantial evidence of an intent different from that already referred to with respect to the property east of the west wharf line. The evidence of dedication resting in estoppel in pais is somewhat stronger with reference to the Tyler tract and the Sweringen tract than it is in relation to the Joy tract, but I think there is ample evidence to reach the same conclusion even with respect to the Joy tract. It is firmly settled by

adjudications of the Supreme Court of this State that no person can deliberately stand by and see improvements placed upon property which they claim or might claim, and, after large sums of money have been expended, successfully assert a claim contrary to their former intentions. It is needless to refer to these authorities. They are entirely familiar to counsel.

I have considered the contention of plaintiffs' counsel to the effect that the City of St. Louis by conferring a right of way upon the railroad and leasing the wharf to Joy have been guilty of a misuser. I cannot appreciate the force of this contention. It certainly appears that the city has by many and divers public acts asserted a claim of ownership to this property as one of its public wharfs, and this claim has been, in my opinion, fully acquiesced in by the plaintiffs and each of them. Even if it be true that there has been any misuser, it cannot be availed of by the plaintiffs in this case as a defense of the rights of the City of St. Louis.

The defendants are entitled to judgment in each of the cases, and such will accordingly be entered.

United States of America,
Eastern Division of the
Eastern Judicial District of Missouri. } ss.

I, James R. Gray, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the writing hereto attached to be a true copy of petition, summons and marshal's return, plea to jurisdiction, order sustaining plea to jurisdiction, amended petition, separate answer, judgment and opinion on

final hearing in Case No. 4217, of Annie F. King, et al., plaintiffs, against City of St. Louis, et al., defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the City of St. Louis, in the eastern division of said district, this 17th day of July, in the year of our Lord nineteen hundred and one.

[Seal] JAMES R. GRAY,
Clerk of said Court.